the husband and therefore estopped by his release, and, further, that "payment, like pardon, relates back to the original act and makes it as though it never had been." This idea of estoppel against the wife seems entirely unsound. Indeed, the court's premise that the statute gives the personal representatives a new right of action is fatal to this estoppel theory. On the other hand, the court seems correct in holding that a new right of action is given by the statute. For not only is the amount recovered not assets in the hands of the administrator, but the measure of damages generally adopted — the actual loss to the deceased's family — is strong to show that the statutes do not merely provide for a survival of the deceased's right of action. Were this the case, damages for the deceased's physical suffering should be allowed, as the fact that the wrongful act resulted in death is surely no ground for a decreased liability on the tortfeasor. The terms of the Georgia statute are singularly broad, and if the decision can be supported at all, it must be upon the ground that the statute is one of a series intended to defeat the operation of the maxim, *Actio personalis moritur cum persona*, and therefore may be so construed that while fully effecting this purpose, it will not contravene the general policy of the law, — to encourage the compromising of actions. But it would seem to be rather a cavalier treatment of a statute which without any qualification gives the personal representatives a new right of action to read into it a proviso that what would be a defence against the party injured will also defeat this right.

THE DISSEISIN REQUISITE TO SUPPORT EJECTMENT. — In a recent case the defendant, a street railway company, without any legal authority, put its tracks on a highway over the plaintiff's land. In a former suit, two years after the road was in operation, the plaintiff sought a mandatory injunction to have the tracks removed. On equitable grounds the injunction was refused, though the defendant's trespass was admitted. The plaintiff now plants himself firmly on his legal right, and brings an action of ejectment. The court refuses to allow the action on two grounds: First, that as the plaintiff was never entitled to the possession of the soil in the highway, he cannot be said to have been excluded or disseised; and, second, that the defendant's act was merely the illegal or excessive user of an admitted easement of public travel, which would only give a right in trespass for damages. *Becker* v. *Lebanon, etc. St. Ry. Co.*, 46 Atl. Rep. 1096 (Pa.). The first objection is contrary to the usual doctrine in regard to public rights of way. The general rule is that the owner of the fee of a highway is entitled to protect his rights by every species of action and remedy which would be open to him if his land were disincumbered of the way. Angel on Highways, § 519; *Thomas* v. *Hunt*, 134 Mo. 392. The plaintiff has a right to have his land restored subject to the public easement; the mere fact that absolute possession cannot be restored is immaterial. The second ground on which the court relies raises the question as to whether or not a street railway company in laying its tracks on a public way can be said to disseise the owner of the fee in such a sense as to allow the action of ejectment. It must be admitted that a railroad assumes a right in the nature of a right of way. There is no claim of freehold, and the passing of trains is only occasional, like the passing of teams over a highway. It differs, however, from the ordinary right of way in that a permanent structure is put upon the servient

tenement, and the nature of the user totally excludes the owner from a part of his land. Instances exactly similar to the principal case have arisen concerning steam railroad tracks laid without authority along a street. It has generally been held that the owner of the fee of the street can maintain ejectment, the acts of the railroad being considered a sufficient ouster to support the action. *Carpenter & Oswego, etc. R. R.*, 24 N. Y. 655. As regards the nature of the ouster requisite in ejectment it is almost impossible to frame an exact rule, the authorities vary so in different jurisdictions. It might be suggested as a test that the ouster must be a permanent trespass, of a kind to substantially exclude the owner from a part of his fee. Ejectment has been allowed, however, for the projection of eaves, roof, and walls. *Murphy* v. *Bolger*, 60 Vt. 723. The Supreme Court of Illinois goes so far as to hold that where a telegraph company put its poles along a highway without compensating the owner of the fee, the latter may maintain ejectment for their removal. *Postal Telegraph Cable Co.* v. *Eaton*, 170 Ill. 513. If ejectment will lie under such circumstances, it is difficult to understand the ground for refusing the action in the principal case. The case is very briefly and unsatisfactorily reported, but on the facts given it seems impossible to support the decision.

Liability of Municipal Corporations for Torts. — Although there has been much litigation in our courts concerning the liability of municipal corporations for torts, the question is still involved in confusion. A recent decision by the New Hampshire court is therefore of value, not only for its full discussion of the subject, but also for its sound reasoning. The plaintiff, employed in the city of Concord waterworks, was injured by the negligence of the city's agents. The court held that the city could not escape liability either on the ground that it was a municipal corporation, or that to a certain extent the undertaking was governmental. *Rhobidas* v. *City of Concord*, 47 Atl. Rep. 82 (N. H.). The principal case is in accord with *Mulcairns* v. *City of Janesville*, 67 Wis. 24.

Most state constitutions provide that no private property shall be taken for public purposes without compensation. This provision rests upon the broad ground that if, as a result of a public undertaking, one man suffers, he should be repaid by all. Following out this principle, courts have held that where a property right of a citizen is in any way invaded during a public undertaking, he should be recompensed. *Ashley* v. *City of Port Huron*, 35 Mich. 296; *Nevins* v. *City of Peoria*, 41 Ill. 502. In both the cases cited, the ground of the decision was a recognition of the principles of natural justice which underlie the constitutional provision. It makes no difference in such a case whether the city was acting in its private corporate capacity or as a subdivision of the government. There is, however, an exception to this rule in those cases where the act is done by one who, though nominally the agent of the city, in reality is not, such as a police officer or a fireman. If this right to compensation is once recognized, there seems to be little reason why it should be confined to trespasses upon property. Whenever a private right is infringed as a result of a public work, particularly if it is an aggressive misfeasance, the same principle of equality should govern and compensation should be made. This is the position taken by the court in the principal case, and it seems to be the logical basis of liability. Certainly one great source of